TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT—The Court should not grant a writ of certiorari because the sole substantive issue decided by the state appellate court involved interpretation of a state statute and the only federal issue raised was not substantiated and was therefore found without merit by that court	4
CONCLUSION	7

Cases Cited

Annual School Election in the School District of the Borough of Watchung, Somerset County, In the Matter of, affirmed by the State Board of Education, November 1, 1972	2, 3, 5, 6
Buren v. Albertson, 54 N. J. L. 72 (Sup. Ct. 1891)	5
Du Four v. State Superintendent, 72 N. J. L. 371 (Sup. Ct. 1905)	5
Welsh v. Bd. of Ed. of Tewksburg Tp., 7 N. J. Super. 141 (App. Div. 1950)	5

Statutes Cited

N.J.S.A. 18A:4-15	6
N.J.S.A. 18A:6-9	5
N.J.S.A. 18A:14-62	2, 4, 6

Rule Cited

Rule 19(1)(a)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-318

JOSEPH F. SHANAHAN and ROBERT J. CORNELL,
Petitioners,

vs.

NEW JERSEY STATE BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of Question Involved

Should a writ of certiorari be granted where the sole issue of any substance decided by the state appellate court involved interpretation of a state statute, and the federal issue raised was not substantiated and was therefore found without merit by that court?

Counter-Statement of the Case

This is a petition for a writ of certiorari by two individuals who seek a ruling that N.J.S.A. 18A:14-62 precludes challengers in New Jersey school elections from taking with them after the election is over informal poll lists they may have compiled during the day of the election.

On February 13, 1973, a school election was held in Lambertville, New Jersey, school district, in which petitioner Joseph F. Shanahan (hereafter Shanahan) is a resident. By letter dated February 22, 1973, Shanahan filed a complaint with the New Jersey Commissioner of Education charging that certain challengers in that election had left the polling places without destroying or disposing of informal poll lists they had compiled. In his decision in this matter rendered on June 29, 1973, the Commissioner noted that the question raised by Shanahan had been considered before in his May 11, 1972 decision, *In the Matter of the Annual School Election in the School District of the Borough of Watchung, Somerset County,* (hereafter *Watchung, 1972*) affirmed by the State Board of Education on November 1, 1972. In that opinion the Commissioner concluded that it would not be improper for a challenger to prepare an informal poll list but that such a list would have to be destroyed following the election pursuant to N.J.S.A. 18A:14-62. Upon reconsideration of this question in connection with Shanahan's petition, the Commissioner overruled his earlier decision requiring destruction of informal poll lists, concluding in effect that N.J.S.A. 18A:14-62 applies only to official poll lists, and dismissed Shanahan's petition. On March 6, 1974 the State Board affirmed the Commissioner's decision that N.J.S.A. 18A:14-62 does not apply to informal poll lists.

By letters dated February 15 and 16, 1973, the second petitioner herein, Robert J. Cornell (hereafter Cornell), filed with the Commissioner petitions charging that in the school elections held on February 6 and 13, 1973 in the school districts of Watchung Hills and Watchung Borough, New Jersey, election officials were advised by their respective school board secretaries that challengers could prepare lists of people voting and could retain those lists, contrary to the directive in *Watchung, 1972* requiring destruction of challengers' lists. On June 29, 1973 the Commissioner rendered a decision covering both Cornell's complaints, adopting the hearing examiner's findings and finding that both school boards conducted their elections based on an understanding that *Watchung, 1972* requires only that election *officials*, not challengers, destroy informal poll lists they may have compiled. The Commissioner noted that *Watchung, 1972* contained a directive requiring destruction of challengers' lists, but overruled this directive for the same reasons set forth in his decision on Shanahan's petition, and dismissed both Cornell's complaints. Cornell appealed from this decision to the State Board of Education, which on March 6, 1974 affirmed the Commissioner's decision for the same reasons given in its affirmance of dismissal of Shanahan's petition on the same issue.

Appeals were taken by both petitioners to the Superior Court of New Jersey, Appellate Division, where they were consolidated by consent order. The State appellate court affirmed the State Board's decisions in a per curiam opinion rendered on March 13, 1975. In that decision the court agreed with the Commissioner's interpretation of the New Jersey statutes governing state school elections and found ". . . no merit to [petitioners'] arguments that the decision of the State Board of Education is arbitrary and capricious in that it failed to consider the integrity

of the school election processes. . . ., and that the structure of the appeals system of the Department of Education is such that it denied procedural due process to them."

The New Jersey Supreme Court denied petitioners' petition for certification on June 4, 1975. Petitioners filed their petition for writ of certiorari on August 29, 1975.

ARGUMENT

The Court should not grant a writ of certiorari because the sole substantive issue decided by the state appellate court involved interpretation of a state statute and the only federal issue raised was not substantiated and was therefore found without merit by that court.

It is well established that this Court generally will review the judgment of a state court on certiorari only where that court has decided a substantial federal question not previously determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court. Rule 19(1)(a).

In the instant case, the sole issue of any substance was one of state law, whether the unofficial poll lists prepared by some challengers in some New Jersey school elections are subject to the non-disclosure requirements of N.J.S.A. 18A:14-62. The State Commissioner of Education concluded that such lists are not subject to the requirements of that state statute, and the State Board of Education and the state appellate court agreed.

Before the state appellate court petitioners suggested that the State Board had failed to decide certain proced-

ural issues presented to it on appeal, and had therefore in effect denied them due process. As best could be determined from petitioners' state appellate brief, the issues they contended had not been decided by the State Board were:

1. the Commissioner's lack of jurisdiction;
2. the Commissioner's failure to document the unenforceability of *Watchung, 1972*;
3. the Commissioner's lack of authority to refuse to apply a remedy which is unenforceable;
4. the possibility that availability of challengers' lists may be rendering school elections unfair.

Even assuming *arguendo* that failure to explicitly decide an issue constitutes a denial of due process, the record below clearly reveals that the four allegedly undecided issues were in fact either decided or no longer required resolution in view of the decision reached by the State Board. First, the New Jersey Commissioner of Education has ". . . jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . or under the rules of the state board or of the commissioner . . ." N.J.S.A. 18A:6-9. This broad grant of jurisdiction necessarily encompasses controversies and disputes arising under Chapter 14 of Title 18A, that portion of the school laws governing school elections. *See, Welsh* v. *Bd. of Ed. of Tewksburg Tp.*, 7 N. J. Super. 141 (App. Div. 1950); *Du Four* v. *State Superintendent*, 72 N. J. L. 371, 372-3 (Sup. Ct. 1905); *Buren* v. *Albertson*, 54 N. J. L. 72, 73-74 (Sup. Ct. 1891). The State Board's decision to proceed with a review of the Commissioner's decision on its merits reflected the Board's correct conclusion that the Commissioner had jurisdiction

over petitioners' controversy. The Board thus by implication stated its finding on that issue. Second, as to the allegation that the Commissioner failed to document his finding of unenforceability and refused to apply an unenforceable remedy, the state appellate court was called upon to review the final administrative decision in this matter, that is, the decision of the State Board, not the Commissioner. Even assuming *arguendo* that the Commissioner should have documented his finding of unenforceability and should not have refused to apply a remedy found to be unenforceable, the State Board did not rest its decision on that finding but on its own independent reasons for overruling *Watchung, 1972,* and therefore his failure to so document was no longer material in a state appellate review of the Board's decision. Third, in contending that the Board failed to consider the impact upon school elections of the availability of challengers' lists, petitioners appear to have assumed that where the State Legislature has not acted as sweepingly as they would like, the State Board has independent authority to extend the scope of school election laws beyond that given them by the Legislature. The State Board has the authority to make and enforce rules implementing and carrying out the school laws. N.J.S.A. 18A:4-15. In petitioners' cases the State Board properly concluded that N.J.S.A. 18A:14-62 applies only to official poll lists ". . . and does not govern the use or retention of the challenger list". (Petitioners' Appendix C, page 42) Therefore even assuming petitioners could have affirmatively shown that such lists were adversely affecting the election process, the State Board would not have the authority to order such lists destroyed or otherwise kept from the public absent other sources of statutory authority.

It is apparent from the foregoing that petitioners' sole federal issue before the state appellate court was frivolous, and that court so found. Petitioners now contend that the state appellate court's failure to elaborate on its reasons for finding their federal question "without merit" was in itself a denial of due process since in their view it reflected that court's failure to "hear" their case. The state court expressly stated that it was fully cognizant of petitioners' due process argument and found it without merit. Petitioners' federal issue was thus fully "heard" and found so devoid of legal merit as to require no judicial elaboration. The absence of legal analysis of the federal question presented reflects negatively upon the question presented, not upon the state court's judgment in rejecting it.

In sum, petitioners seek a writ of certiorari to review a state court decision substantially grounded in state law, in which the federal question raised was expressly found to be totally without merit.

CONCLUSION

It is respectfully submitted that the petition should be denied because the state appellate decision of which petitioners seek review involves no substantial federal question suitable for the Court's consideration.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent State Board of Education